

No. 16139

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROY VERNON SHAW,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

LAUGHLIN E. WATERS,  
*United States Attorney,*

ROBERT JOHN JENSEN,  
*Assistant United States Attorney,*  
*Chief, Criminal Division,*

THOMAS R. SHERIDAN,  
*Assistant United States Attorney,*  
600 Federal Building,  
Los Angeles 12, California,  
*Attorneys for Appellee.*

**FILED**

NOV - 8 1958

PAUL P. O'BRIEN, CLERK



# TOPICAL INDEX

	PAGE
I.	
Jurisdiction .....	1
II.	
Statute involved .....	2
III.	
Statement of the case.....	2
IV.	
Statement of the facts.....	3
V.	
Argument.....	11
Preliminary statement .....	11
Point One. The effect of the controlling Selective Service Regulations .....	11
Point Two. The appellant did not bring himself within regulations governing reopening.....	14
Point Three. Appellant did not submit new evidence which if true would justify a change in his classification.....	15
Point Four. The Local Board was not required to advise appellant it would not reopen his classification.....	18
VI.	
Conclusion .....	19
Appendix I. Order for judgment.....App. p.	1

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Bates v. United States, 216 F. 2d 130, cert. granted, rrvs'd	348
U. S. 966.....	17
Dickinson v. United States, 346 U. S. 389.....	17
Leitner v. United States, 222 F. 2d 363.....	17
Olvera v. United States, 223 F. 2d 880.....	18
Ransom v. United States, 223 F. 2d 15.....	19
Stain v. United States, 235 F. 2d 339.....	17
United States v. Capehart, 237 F. 2d 388, cert. den. 352 U. S.	
971 .....	17
United States v. Colford, 238 F. 2d 858.....	17
United States v. Diercks, 223 F. 2d 12, cert. den. 350 U. S.	
841 .....	17
United States v. Hill, 221 F. 2d 437, cert. den. 349 U. S. 964....	17
United States v. LaCasse (S. D. Cal.), No. 23,222, Jan. 13,	
1954 .....	18
United States v. Manus, 232 F. 2d 709.....	17
United States v. Nichols (S. D. Cal.), No. 22,951, Dec. 14,	
1953 .....	18
United States v. Nimori (N. D., Cal.), No. 33,680, Sept.	
25, 1953 .....	18
United States v. Vincelli, 216 F. 2d 681.....	19
Witmer case, 348 U. S. 375.....	19

### REGULATIONS

32 Code of Federal Regulations, Regulation 1622.43 .....	17
32 Code of Federal Regulations, Regulation 1625.2.....	12, 13
32 Code of Federal Regulations, Regulation 1625.4.....	13, 18
32 Code of Federal Regulations, Regulation 1625.3.....	12, 13

### STATUTES

United States Code, Title 18, Sec. 3231.....	2
United States Code, Title 50, Appdx., Sec. 462 .....	1, 2

No. 16139  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

ROY VERNON SHAW,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

I.  
**JURISDICTION.**

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on February 5, 1958, under Section 462 of Title 50, United States Code, Appendix, for knowingly failing and neglecting to report for civilian work in lieu of induction as ordered to do by Local Board 79. [Tr. 3-4.]

After the appellant was arraigned and pleaded not guilty, the appellant was tried in the United States District Court for the Southern District of California, Northern Division, before the Honorable Gilbert H. Jertberg without a jury on April 25, 1958, and at the close of evidence and argument Judge Jertberg took the matter under submission. On May 28, 1958, Judge Jertberg adjudged the defendant guilty as charged and sentenced

him to the custody of the Attorney General or his authorized representative for imprisonment for a period of ninety days. [Tr. 8-9.]

The District Court had jurisdiction of the cause of action under 50 U. S. C., Appendix 462, and 18 U. S. C. 3231.

## II.

### STATUTE INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

“(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment . . .”

## III.

### STATEMENT OF THE CASE.

The Indictment returned on February 5, 1958, charges that the appellant was duly registered with Local Board No. 79 in Bakersfield, California; he was classified I-O; he was ordered to report for civilian work contributing to the maintenance of the National Health, Safety, and Interest at the Los Angeles County Department of Charities on September 24, 1957; and at that time he knowingly failed and neglected to report for civilian work in lieu of induction into the Armed Forces of the United States as so notified and ordered to do. [Tr. 3-4.]

After arraignment and a plea of not guilty, the appellant was tried before the Honorable Gilbert H. Jertberg without a jury on April 25, 1958. On May 7, 1958, the Court filed an order for judgment in which the Court found the appellant guilty as charged in the Indictment. On May 28, 1958, Judge Jertberg sentenced the defendant to imprisonment for a period of ninety days. [Tr. 8-9.] On May 28, 1958, the defendant filed a notice of appeal. [Tr. 9-10.]

Appellant assigned as error the Judgment of conviction on the following grounds:

(1) The District Court erred in failing to grant the Motion for Judgment of Acquittal;

(2) The District Court erred in convicting the appellant and entering a judgment of guilty against him. (App. Br. p. 5.)

#### IV.

#### STATEMENT OF THE FACTS.

The following facts are obtained from Government's Exhibit 1 in evidence [the appellant's Selective Service File]:<sup>1</sup>

September 18, 1951: Appellant registered at Local Board 79 in Bakersfield, California. [Ex. 1-2.]

December 18, 1951: Defendant returned his Classification Questionnaire (SSS Form 100) to Local Board 79, in which he signed Series XIV indicating he claimed conscientious objection to participation in war. [Ex. 5-11.]

---

<sup>1</sup>Hereinafter this Exhibit will be referred to as "Ex." followed by the appropriate page in said Exhibit.



March 17, 1952: Appellant returned his Special Form for Conscientious Objector (SSS Form 150) to Local Board 79 in which he claimed conscientious objection to both combatant and noncombatant training and service. Appellant in this form claimed belief in a supreme being, and stated he was not a member of a religious sect or organization. [Ex. 14-17.]

April 21, 1952: Local Board 79 classified appellant I-AO by a vote of 3 to 0. [Ex. 12.]

April 22, 1952: Local Board 79 mailed appellant a Notification of Classification (SSS Form 110) advising him of his I-AO classification. [Ex. 12.]

February 3, 1953: Local Board 79 mailed appellant an Order to Report for Armed Forces Physical Examination (SSS Form 223) on February 11, 1953. [Ex. 18.]

February 18, 1953: Local Board 79 mailed appellant a Certificate of Acceptability (Form DD-62) advising him that as a result of his physical examination he was found not acceptable for induction and it was recommended that he be re-examined in six months. [Ex. 12.]

March 9, 1953: Local Board 79 classified appellant IV-F by a vote of 3 to 0, and mailed him a Notification (SSS Form 110) of such classification. [Ex. 12.]

July 20, 1953: Local Board 79 received a College Student Certificate (SSS Form 109) from California State Polytechnic College indicating that appellant completed his first year in the school of agriculture. [Ex. 19-20.]

August 31, 1953: Local Board 79 mailed appellant an Order to Report for Armed Forces Physical Examination (SSS Form 223) on September 9, 1952. [Ex. 21.]

September 15, 1953: Local Board 79 mailed appellant a Certificate of Acceptability (Form DD-62) advising



him that as a result of physical examination he was found fully acceptable for induction. [Ex. 23.]

September 25, 1953: Appellant returned to Local Board 79 the College Questionnaire (Form C-296) in which he indicated he had completed his first year of college. [Ex. 58-59.]

October 5, 1953: Local Board 79 classified appellant II-S by a vote of 3 to 0. [Ex. 12.]

October 6, 1953: Local Board 79 mailed appellant a Notification of Classification (SSS Form 110) advising him of his II-S classification; and mailed him a form (Form C-242) to be completed by his college in regard to his enrollment and satisfactory pursuance of a full-time course of study. [Ex. 60.]

November 2, 1953: Local Board 79 classified appellant I-A by a vote of 3 to 0 (the Form C-242 had not been returned) and notified him of this classification (SSS Form 110). [Ex. 5.]

November 12, 1953: Local Board 79 received the Form C-242 signed by the Recorder of appellant's college. [Ex. 60.]

November 16, 1953: Local Board 79 classified appellant II-S by a vote of 3 to 0. [Ex. 5.]

November 17, 1953: Local Board 79 notified (SSS Form 110) appellant of his II-S classification. [Ex. 12.]

July 9, 1954: Local Board 79 received a College Student's Certificate (SSS Form 109) from appellant indicating he had completed his second year in agricultural college. [Ex. 61-62.]

July 22, 1954: Local Board 79 mailed appellant a College Questionnaire (Form C-296). [Ex. 63.]

August 3, 1954: Local Board 79 received the completed College Questionnaire (Form C-296) from appellant as well as a change of address. [Ex. 63-66.]

August 23, 1954: Local Board 79 classified appellant II-S by a vote of 2 to 0. [Ex. 12.]

August 24, 1954: Local Board 79 notified (SSS Form 110) appellant of his II-S classification. [Ex. 12.]

September 20, 1954: Local Board 79 mailed appellant a form (Form C-242) to be filled out by his college. [Ex. 67.]

October 11, 1954: Local Board 79 received the Form C-242 from appellant's college. [Ex. 67.]

July 14, 1955: Local Board 79 mailed appellant a College Questionnaire (Form C-296). [Ex. 68-69.]

July 19, 1955: Local Board 79 received the College Questionnaire (Form C-296) from appellant. [Ex. 68-69.]

August 5, 1955: Local Board 79 sent the College Questionnaire (Form C-296) back to appellant to be completed. [Ex. 68-69.]

August 11, 1955: Local Board 79 received the completed College Questionnaire (Form C-296) from appellant. [Ex. 68-70.]

August 15, 1955: Local Board 79 received a College Student Certificate (SSS Form 109) from appellant indicating he had completed his third year of college. [Ex. 71-72.]

August 22, 1955: Local Board 79 classified appellant II-S by a vote of 3 to 0. [Ex. 12.]

August 23, 1955: Local Board 79 notified (SSS Form 110) appellant of his II-S classification. [Ex. 12.]

October 14, 1955: Local Board 79 received notification from appellant's college that appellant was enrolled and satisfactorily pursuing a full-time course (Form C-242). [Ex. 73.]

July 24, 1956: Local Board 79 mailed appellant a College Questionnaire (Form C-296). [Ex. 12.]

August 20, 1956: Local Board 79 reclassified appellant I-A by a vote of 2 to 0. [Ex. 12.]

August 21, 1956: Local Board 79 notified (SSS Form 110) appellant of his I-A classification. [Ex. 12.]

August 31, 1956: Local Board 79 received a letter from appellant in which he stated that he was dissatisfied with his I-A classification and would like a personal appearance before the appeal board. Local Board 79 received a second letter from appellant requesting an appeal of his classification. [Ex. 74-77.]

September 10, 1956: Local Board 79 advised appellant that he would be notified when to personally appear before the board. [Ex. 78.]

September 20, 1956: Local Board 79 notified appellant to personally appear before the board on October 1, 1956 (Form C-310), and in a P.S. advised appellant: "although you asked for a personal appearance before the Appeal Board, we feel you meant Local Board, as the Appeal Board grants no personal appearances." [Ex. 79.]

October 1, 1956: Appellant personally appeared before Local Board 79 and advised: That he became a member of Jehovah's Witnesses on March 1, 1953, that he is an ordained minister who devotes approximately eight hours a week to his ministerial duties and fifty hours a week to his secular job, and that he got married in June of

1956. At the conclusion of the personal interview the board classified defendant I-O by a vote of 3 to 0. [Ex. 12-13, 80-86.]

October 2, 1956: Local Board 79 notified (SSS Form 110) appellant of his I-O classification. [Ex. 13.]

October 29, 1956: Local Board 79 mailed appellant a Dependency Questionnaire (SSS Form 118). [Ex. 13, 87-91.]

November 8, 1956: Appellant returned his Dependency Questionnaire (SSS Form 118) to Local Board 79. [Ex. 87-92.]

December 20, 1956: Local Board 79 mailed appellant a Special Report of Class I-O Registrants (SSS Form 152) explaining what is required of I-O registrant. [Ex. 93-96.]

December 31, 1956: Appellant returned the Special Report of Class I-O Registrant (SSS Form 152) without completing it, but with the statement: "I cannot, according to my belief, accept any work offered me by the Local Board, unless it be with the Watchtower Bible and Tract Society of 117 Adams Street, Brooklyn 1, New York." [Ex. 94.]

January 24, 1957: Local Board 79 wrote to the State Director of Selective Service asking what type of work was available for I-O registrants. [Ex. 97.]

January 30, 1957: Local Board 79 received a letter from the State Director advising the board of the type of work available for I-O registrants. [Ex. 98.]

February 26, 1957: Local Board 79 wrote to appellant offering him three types of approved civilian work in lieu of induction into the Armed Forces. [Ex. 99.]

March 11, 1957: Appellant returned the offer of work to Local Board 79 in which he declined to accept any of the work offered. Appellant also wrote a letter to the board advising them that he would not accept any work that did not fit in with his religious convictions. [Ex. 99-100.]

April 25, 1957: Local Board 79 sent appellant's Selective Service File to the State Director for review. [Ex. 102.]

April 29, 1957: The State Director advised Local Board 79 to set up a meeting with the appellant and a representative from the State Director's office. [Ex. 103.]

May 7, 1957: Local Board 79 directed appellant to appear for an interview on May 23, 1957. [Ex. 104.]

May 23, 1957: Appellant met with Local Board 79 and the State Director's representative, at which time he filed three affidavits. After the interview appellant signed a statement that he could not and would not accept any position offered by the Local Board in lieu of induction. [Ex. 105-114.]

July 11, 1957: Local Board 79, via the State Director, sent appellant's Selective Service File to National Headquarters requesting authority to order appellant to perform work at Los Angeles County Department of Charities in lieu of induction into the Armed Forces. [Ex. 115-117.]

July 29, 1957: Local Board 79 received authority from National Headquarters to order defendant to work at Los Angeles County Department of Charities in lieu of induction. [Ex. 118.]

September 13, 1957: Local Board 79 mailed defendant an Order to Report for Civilian Work (SSS Form 153)

in which appellant was ordered to report to the Local Board on September 24, 1957, where he was to receive instructions to proceed to the place of employment: Los Angeles County Department of Charities. [Exs. 121-122.]

September 24, 1957: Appellant did not report to the Local Board or proceed to the Los Angeles County Department of Charities as ordered. [Ex. 123-129.]

October 18, 1957: Local Board 79 sent appellant's Selective Service File to the State Director for review (Form C-302). [Ex. 130.]

October 21, 1957: State Director sent appellant's Selective Service File to National Headquarters for review. [Ex. 131.]

November 6, 1957: State Director reported appellant to the United States Attorney of the Southern District of California for failure to report for civilian work as ordered.

By way of synopsis the Selective Service File indicates that appellant registered in September of 1951, claimed he was a conscientious objector, was deferred for four years while he completed college, was classified as a conscientious objector, and when ordered to perform civilian work in lieu of induction he refused.



V.

ARGUMENT.

Preliminary Statement.

Appellant's case herein rests upon just one fundamental point, namely: the appellant submitted new evidence to Local Board 79 after his last classification, and Local Board 79 should have either reopened and reclassified appellant or should have notified appellant that it was not going to reopen his classification. Hence, it is apparent that appellant is attempting to place appellee upon the horns of a dilemma, but appellee will show that there is in fact, no dilemma present because appellant's initial premise is a mere assertion and not a fact.

POINT ONE.

The Effect of the Controlling Selective Service Regulations.

The following Regulations govern the reopening and reclassifying of a registrant:

1625.2. *When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change



in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) unless the local Board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control. (32 C.F.R. 1625.2.)

1625.3. *When registrant's classification shall be reopened and considered anew.* The local board will reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon the receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. (32 C.F.R. 1625.3.)

1625.4. *Refusal to reopen and consider anew registrant's classification.* When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification

and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required. (32 C.F.R. 1625.4.)

We can immediately dismiss Regulations 1625.3 providing for mandatory reopening inasmuch as there is no written request by the State Director or the National Director to reopen appellant's classification.

In essence, as far as this case is concerned Regulation 1625.2 provides that the local board may reopen and reclassify a registrant when the following factors are present:

a. A written request by the appellant to reopen his classification;

b. Written information (accompanying the written request to reopen) which must contain:

(1) new evidence,

(2) which, if true, would justify a change in appellant's classification.

In essence, as far as this case is concerned, Regulation 1625.4 provides that if appellant files a written request to reopen his classification and:

a. presents evidence which is not new, or

b. presents evidence which is new, but still does not justify a change in classification; then the local board shall advise the appellant in writing that his classification is not being reopened.

These two regulations comprise the horns of the dilemma offered by appellant.

## POINT TWO.

### The Appellant Did Not Bring Himself Within the Regulations Governing Reopening.

Each of the three Regulations governing reopening (cited above) requires a *written request* (emphasis supplied). In the instant case there is no written request from anyone to reopen appellant's classification; and further, there is no written communication that is even colorably or arguably a request to reopen. Although not designated as a part of the record appellee has seen fit (with acknowledgment and agreement from appellant's counsel) to attach as Appendix I to this brief the District Court's "Order for Judgment" in which the trial judge stated his findings and conclusions. In this "Order for Judgment" the Court declared: "The record is clear that the defendant made no express request that his classification be reopened." (Appendix.)

It is appellee's position that this court need not rule on appellant's arguments because they are moot, inasmuch as they presuppose the existence of a written request to reopen which is in fact non-existent and so declared by the trier of fact. Therefore, before reaching appellant's arguments this court would first have to redécide the factual issue of whether or not there is a written request to reopen in appellant's Selective Service File; and appellee respectfully submits that it is a maxim of the law that appellate courts will not redetermine the facts passed upon by the trier of fact. It is also worthy of note that in the instant case appellant does not and cannot claim that he ever requested (in writing or otherwise) that his classification be reopened; and thus, we are not even faced with the question of substantial evidence.

### POINT THREE.

#### Appellant Did Not Submit New Evidence Which if True Would Justify a Change in His Classification.

This point naturally presupposes that the court find the requisite written request to reopen. For the sole purpose of showing that appellant's argument still lacks merit we shall assume, as did appellant in his brief, the existence of a written request to reopen appellant's classification.

The facts are undisputed that on August 20, 1956, Local Board 79 classified appellant I-A, and within the time allowed for appeal the appellant requested a personal appearance and an appeal [Ex. 74-77]. Appellant on September 20, 1956 had a personal appearance before Local Board 79; and at the conclusion of this appearance, Local Board 79 classified appellant I-O [Exs. 12-13]. When appellant appeared before the Local Board he advised them: he became a Jehovah's Witness on March 1, 1953 (this is the first time the Board was advised of this fact); he became an ordained minister on March 1, 1953; and he spent 8 hours a week in the performance of his ministerial duties, and 50 hours a week in his secular employment as a salesman for a plant food concern [Ex. 80-86].

The appellant was duly notified of his I-O classification and did not appeal this classification.

For the next six months Local Board 79 attempted, without success, to place appellant in approved civilian work in lieu of induction. It is during this period that appellant claims he submitted "new" evidence bearing on his classification. What is this "new" evidence? Appellant merely states that the following documents in his Selective Service File constitute new evidence:

a. His letter to the Local Board on March 7, 1957 in which he offers an explanation as to why he does not wish to perform any of the three types of civilian work he was offered [Ex. 100].

b. The three affidavits from fellow Jehovah Witnesses attesting to appellant's good character [Ex. 105, 106 and 109].

Without laboring the issue, it is apparent that any information contained in these documents is not "new" evidence. Appellee invites a comparison of these documents with pages 80-86 of the appellant's Selective Service File [Ex. 80-86].

On May 23, 1957, appellant was once again interviewed at Local Board 79, at which time he himself clearly indicated: that there was no change in his status since his last personal interview, and that he considered the three affidavits [Ex. 105, 106 and 109] as character references [Ex. 110-114].

Again referring to the trial court's finding (Appendix I) Judge Jertberg found:

"I find nothing in the affidavits or in the transcript of the hearing which contains information which was not already before the Board and which the Board had not previously considered. . . ." (Appendix.)

Hence, it is clear that appellant is asking this court to redécide the factual issue squarely presented and decided in the trial court, namely: did appellant submit new evidence?

Before passing this point there is one further consideration. Assuming the existence of the written request to reopen, and assuming further that appellant presented new evidence, this court would then have to redécide the



factual issue of whether or not this new evidence, if true, would justify a change in appellant's classification.

The trial judge when considering this very point specifically found: "nothing which would justify a change in the registrant's classification" (Appendix).

This court was faced with this question of reopening in the *Stain* case (*Stain v. United States*, 235 F. 2d 339 (9th Cir., 1956)); wherein this court held that the local board must follow the regulations on reopening.

Appellee will not discuss in detail the law as to whether or not appellant would be entitled to a ministerial classification (IV-D) (as we would first have to make the series of assumptions discussed above), other than to point out that under the Selective Service Regulation defining a "regular or duly ordained minister" (32 C.F.R. 1622.43) and the numerous cases interpreting and applying this regulation it is clear that appellant would not be entitled to a IV-D classification.

*Dickinson v. United States*, 346 U. S. 389 (1953);  
*United States v. Capehart*, 237 F. 2d 388 (4th Cir., 1956), cert. den. 352 U. S. 971 (1956);

*United States v. Diercks*, 223 F. 2d 12 (7th Cir., 1955), cert. den. 350 U. S. 841 (1955);

*United States v. Hill*, 221 F. 2d 437 (7th Cir., 1955), cert. den. 349 U. S. 964 (1955);

*Bates v. United States*, 216 F. 2d 130 (8th Cir., 1954), cert. granted, reversed on other grounds, 348 U. S. 966 (1955);

*United States v. Colford*, 238 F. 2d 858 (6th Cir., 1956);

*United States v. Manns*, 232 F. 2d 709 (7th Cir., 1955);

*Leitner v. United States*, 222 F. 2d 363 (4th Cir., 1955).

#### POINT FOUR.

#### The Local Board Was Not Required to Advise Appellant It Would Not Reopen His Classification.

The second horn of the dilemma offered by appellant is that Regulation 1625.4 (32 C.F.R. 1625.4) applies to the instant case and was violated by the Local Board. This contention must also fail because there is no written request to reopen appellant's classification. We hereby incorporate our argument given in Point Two above on the necessity and absence of a written request to reopen in order to come within the purview of this regulation.

Appellee also wishes to point out that this argument was not raised in the trial court [Tr. 5-7; and Appendix I], and should not be considered for the first time on appeal.

Appellant cites several authorities in support of his contention that failure to advise a registrant that his classification will not be reopened is grounds for acquittal. Naturally, this question is not reached unless there is first a written request to reopen accompanied by some evidence.

The *Nimori* case (*United States v. Nimori*, N. D. Calif., No. 33,680, September 25, 1953), the *Nichols* case (*United States v. Nichols*, No. 22,951, S. D. Calif., December 14, 1953), and the *LaCasse* case (*United States v. LaCasse*, No. 23,222 S. D. Calif., January 13, 1954), are unreported District Court cases which are clearly distinguished from the instant case on the facts, and are in no way binding or controlling on the issues raised in this case.

In the *Olvera* case (*Olvera v. United States*, 223 F. 2d 880 (8th Cir., 1955), the court pointed out that *Olvera*



had filed a written request for reopening, had a hearing, and still the local board refused to reopen on the ground that it didn't have to, is clearly distinguished from the instant case.

In *Ransom v. United States* (223 F. 2d 15 (7th Cir., 1955)), the court specifically found that *Ransom* had written to his local board requesting his classification be opened several different times, and that *Ransom* had presented new evidence. Also it appears that the Local Board did in fact advise *Ransom* that they were not going to reopen his classification.

In *United States v. Vincelli*, 216 F. 2d 681 (2nd Cir., 1954), the registrant presented a written request to reopen accompanied by a written statement and thus this case is distinguished from the instant case.

By way of conclusion the Supreme Court in the *Witmer* case (348 U. S. 375, 384 (1954)), when speaking of reopening and reclassifying, made a statement which is most apt to appellant's position: "mere cavilling."

## VI.

### Conclusion.

I. The appellant was not entitled to have his classification reopened because he did not make a written request to reopen.

II. The appellant did not present any new evidence bearing on his classification.

III. Even if the evidence appellant presented is considered to be new and is considered to be true, it would not justify a change in his classification.

IV. The Local Board was not required to advise appellant that they were not reopening his classification because appellant never made a written request to have his classification reopened.

V. The conviction should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,

*United States Attorney,*

ROBERT JOHN JENSEN,

*Assistant U. S. Attorney,*

*Chief, Criminal Division,*

THOMAS R. SHERIDAN,

*Assistant U. S. Attorney,*

*Attorneys for Appellee.*





## APPENDIX I.

United States District Court, Southern District of California, Northern Division.

United States of America, Plaintiff, vs. Roy Vernon Shaw, Defendant. No. 3521-ND.

### ORDER FOR JUDGMENT.

The defendant, Roy Vernon Shaw, by indictment filed in this Court on February 5, 1958, was charged with a violation of the Universal Military Training and Service Act, Title 50 App. U.S.C.A. Section 462, in that he knowingly failed and neglected to report for civilian work contributing to the maintenance of the national health, safety and interest at the Los Angeles County Department of Charities on September 24, 1957, as ordered by Local Board No. 79 in Bakersfield, California, on September 13, 1957.

The evidence on behalf of the United States consisted of a certified copy of the Selective Service record of the defendant on file in the office of Local Board No. 79 on stipulation of the parties and marked Plaintiff's Exhibit No. 1. The evidence on behalf of the defendant consisted of the testimony of the defendant and Defendant's Exhibit "A."

Defendant made an offer of proof as follows: That if the defendant and certain other witnesses who were designated as congregational servants, were permitted to testify as to the defendant's ministerial status, the testimony would show that every Jehovah's Witness has two congregations, one a geographical congregation which is that Witness' exclusive congregation, and the other a home congregation, in this case, the Delano congregation, eighty

in number, with three or four other servants, and that the testimony of these persons would be to explain the importance of the work of these servants, give a brief synopsis of their duties and to point out that in many instances the congregational servants are required to spend less time than is required of some of the other servants, and even some of the members who do not have servant status.

The offer of proof was rejected by the Court.

An examination of Exhibit No. 1 reveals, among other things, the following:

August 20, 1956, Local Board 79 classified defendant 1-A by a vote of 2 to 0.

August 21, 1956, Local Board 79 notified defendant of his 1-A classification (SSS Form 110).

August 31, 1956, Local Board 79 received a letter from defendant requesting a personal appearance before the appeal board, and a letter requesting an appeal.

September 10, 1956, Local Board 79 advised defendant that he would be notified when to appear before the Board.

September 20, 1956, Local Board 79 notified defendant to personally appear before the board on October 1, 1956.

October 1, 1956, defendant personally appeared before Local Board 79 and advised: That he became a member of Jehovah's Witnesses on March 1, 1953; that he is an ordained minister who devotes approximately eight hours a week to his ministerial duties and fifty hours a week to his job; and that he got married in June of 1956. After the interview, the board classified him 1-O by a vote of 3 to 0.

October 2, 1956, Local Board 79 notified defendant of his 1-O classification.

October 29, 1956, Local Board 79 sent defendant a dependency questionnaire.

November 8, 1956, defendant returned the completed questionnaire.

December 20, 1956, Local Board 79 mailed defendant a Special Report for Class 1-O Registrants explaining what is required of 1-O registrants.

December 31, 1956, defendant returned the uncompleted Report with the statement: "I cannot, according to my belief, accept any work offered me by the local board, unless it be with the Watchtower Bible and Tract Society \* \* \*."

January 24, 1957, Local Board 79 wrote to the State Director asking what type of work was available for 1-O registrants.

January 30, 1957, the State Director replied with a list of the jobs available and the salary of each.

February 26, 1957 Local Board 79 forwarded the information to the defendant, offering him three types of jobs.

March 11, 1957, defendant declined all of the offers, and stated he would decline any work which did not fit in with his religious duties.

April 25, 1957, Local Board 79 sent defendant's file to the State Director for review.

April 29, 1957 the State Director asked Local Board 79 to arrange a meeting of the local board, a representative of the State Director and the defendant.

May 7, 1957, Local Board 79 directed the defendant to appear for interview on May 23, 1957.



May 23, 1957, defendant met with the representative of the State Director, and the local board, and after interview, he signed a statement that he would not accept any position offered by the local board in lieu of induction.

July 11, 1957, file was sent by State Director to the National Headquarters requesting authority to order the defendant to perform work at the Los Angeles County Dept. of Charities in lieu of induction.

September 13, 1957, Local Board 79 ordered the defendant to report to the local board on September 24, 1957 for instructions to proceed to the place of employment.

September 24, 1957, defendant failed to report.

Defendant's Exhibit "A," the registration certificate was signed by the registrar for Local Board No. 77. The Selective Service file, Plaintiff's Exhibit No. 1, shows the selective service processing, subsequent to the registration, to have been done by Local Board No. 79. The registration card, SSS Form No. 1, apparently prepared at the time of registration and retained in the files of the local board, shows the registrar to have been "Nadine Maclin, Registrar for local board 77," as is shown on defendant's Exhibit "A," but the registration card also carries a stamped notation "Local Board No. 79, Kern County, September 18, 1951, 704 E. 21st Street, Bakersfield, California" at the place where it is indicated by printed direction "Stamp of local board of jurisdiction as determined by item 2, front of card." Item 2 on the front of the card is the address of the registrant. There is no reference to or explanation for the designation "Local Board 77" in the file or in Exhibit 1.

At the conclusion of the plaintiff's case, and again at the conclusion of the defendant's case, the defendant moved the Court for a judgment of acquittal, based upon the following grounds:

1. The local board denied defendant due process of law in that it never gave the required consideration to his claim and evidence for a IV-D classification.
2. Defendant was denied due process in that his classification was not reopened after he submitted the precise new and further evidence specifically requested of him by the local board, and further, he was thereby frustrated from securing an appellate determination on such augmented record.
3. The denial of the claim for exemption as a minister of religion by all of the draft boards, and each of them, is without basis in fact, arbitrary, capricious and contrary to law.
4. The denial of the ministerial classification is illegal, arbitrary, and capricious because the draft boards employed artificial standards in determining what constitutes a minister of religion within the meaning of the Act and regulations; and they did not follow the definition of the term used in the Act and regulations in determining the claim of the defendant as a minister of religion.
5. The denial of the ministerial classification by the draft boards was arbitrary and capricious in that they held that the performance of secular work by the defendant, alone, without determining whether it was his avocation and used his performance of secular work to defeat illegally his ministerial status because the undisputed evidence showed that he is not engaged in secular work as a main business but only incidentally to his main work of the min-

istry, and that, according to the Act and Regulations, he is regularly and customarily engaged in teaching and preaching the doctrines and principles of a recognized church, and pursues such preaching work as his vocation, and does not preach incidentally to his performance of any secular work; and therefore the draft board order is illegal, contrary to law and without basis in fact.

6. Defendant was denied procedural due process in that the local board failed to have available an Advisor to registrants and to have posted conspicuously or any place, the names and addresses of such adviser, as required by the regulations, and to defendant's prejudice.

7. The plaintiff has wholly failed to show that jurisdiction existed in the local board 79 empowering it to issue to defendant a valid order to do civilian work.

8. Defendant requested a personal appearance before the appeal board but this was refused.

It is my view that the evidence fails to support defendant's contentions under grounds 6, 7 and 8. Local Board 79 had jurisdiction to issue the order which defendant failed to perform. It is to be presumed that there was posted the names and addresses of advisers as required by the regulations, and this presumption was not overcome. Furthermore, no prejudice to the defendant was shown. There is nothing in the record to show that the local board refused any request for a personal appearance which the defendant made.

The other grounds revolve around the contention of the defendant that his case should have been reopened and that his claimed status as a minister should have been considered and that he was thereby denied due process of law and an administrative appeal. The regulations governing

the reopening of a classification are found in Part 1625.2, 1625.3 and 1625.4 of Title 32, Code of Federal Regulations. These regulations provide:

1625.2. *When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) unless the Local Board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1625.3. *When registrant's classification shall be reopened and considered anew.* The local board will reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon the receipt of such request shall immediately cancel any Order to Report for Induction (SSS

Form No. 252) which may have been issued to the registrant.

1625.4. *Refusal to reopen and consider anew registrant's classification.* When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

Defendant's contentions regarding the reopening revolve around the personal appearance before the Board on May 23, 1957 which was arranged following defendant's declination to perform any civilian work offered by the Board. At that hearing defendant presented three affidavits which appear on page 105 of Exhibit "1." The transcript of the hearing appears on page 110 of the Exhibit "1." The record is clear that the defendant made no express request that his classification be reopened. I find



nothing in the affidavits or in the transcript of the hearing which contains information which was not already before the Board and which the Board had not previously considered, and nothing which would justify a change in the registrant's classification.

The guilt of the defendant of the offense set forth in the indictment has been proved beyond a reasonable doubt. Accordingly, I find the defendant guilty of the offense set forth in the indictment.

I order and direct the defendant to appear before this Court on May 26, 1958, at the hour of 10:00 A.M. for the pronouncement of sentence. I further direct that the Probation Officer make a pre-sentence investigation and file with the Clerk of this Court a report on or before May 26, 1958 at 10:00 A.M.

The Clerk of this Court is directed to forthwith mail copies of this order to the defendant, counsel for the plaintiff and the defendant and to the Deputy Probation Officer at Fresno, California.

Dated: May 7, 1958.

GILBERT H. JERTBERG,  
*Judge, United States District Court.*

